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AUSTRALIAN FEDERATION AND ITS BASIS.

BY EDMUND BARTON.

The Constitution under which it is proposed to unite the Australian Colonies establishes a federation under the Crown of the United Kingdom of Great Britain and Ireland. It is more democratic than the Constitution of the United States, and not only more democratic, but more federal, than the Constitution of the Dominion of Canada. Let me make a few comparisons. It is a constitution markedly of the British type, in that it operates not only by way of constitutional government, but by way of responsible government. The Federal Ministry are liable to be displaced at any moment by the vote of one House, the House of Representatives: and the overwhelming power of its vote is assured by giving over to it the control of the purse-strings. The Senate has a veto, of course; but, as we shall see, that veto may be rendered ineffective in the case of continued disagreement between the two houses.

Of the sixteen federations of the world, fourteen recognize the principle of equal representation in one of the two chambers of the National Legislature. I hold the opinion that the federal idea naturally suggests such a condition; and that, apart from academic arguments, federalists may well demand it, in view of the fact that its maintenance has secured so fair a balance in the federal evolution. It will amuse American readers to be told that Australian provincialists daily, and through great numbers of their speakers, insisted that the War of Secession was entirely traceable to the existence of equal representation in the United States Senate. One of the strangest incidents of this contention is that it was most loudly asserted by the men who professed academic superiority. Was their fault an ignorance, or an ignoring, of history? In the

Australian Federation, original States will have equal representation in the Senate.

The plan of the Australian Constitution will probably not surprise an American; yet, if it were largely different, it would surprise an Englishman. One of the striking sayings which marked the debates of the Convention which met at Adelaide in 1897 for the purpose of framing the Constitution was an utterance by Sir Richard Baker, shortly before his appointment to the Chairmanship of Committees. He said of the idea of implanting Responsible Government in a Federal Constitution: "Either Federation will kill Responsible Government, or Responsible Government will kill Federation." Sir Richard Baker supports the new Constitution. We may infer that he does not believe that either Responsible Government or Federation has received its death blow. A problem which appeared to a strong and learned constitutionalist to be insoluble at the outset has probably been solved, and in such a way that we shall see the mainspring of a federation, the principle which aims at blending the voice of the people and that of the States, preserved, while no jot is lost of those strong principles which, among men of British race, are now considered indispensable to their instruments of self-government.

Now, the Constitution of the United States provides that "all bills for raising revenue must originate in the House of Representatives, but the Senate may propose or concur in amendments as in other bills." Under the Australian Constitution, not only must revenue-raising bills originate in the House of Representatives, but appropriation bills also must begin there, and the power of amendment in the case of money bills is emphatically denied to the Senate. There is a power to suggest amendments by message; such a power would perhaps exist, without express authority in the Constitution; but it is impossible to mistake the sternness with which the Australian charter declares and conserves the power of the people to decide questions of taxation and expenditure, through the House which represents the voting power according to its numerical value.

I have said that the Constitution is attacked on the ground that original States are equally represented in the Senate, and that the Senate will thus be the stronger of the two houses. How would American citizens appraise the power of a Senate which cannot originate or amend either a revenue or an expenditure bill? It will

require more than a personal assurance to make one of them believe that a Senate so pent is still, to quote the adversary, "the dominant House."

Although the United States Senate represents the States in the light of their equal contractual capacity, Americans have not told the world that it fails to represent the people of the States. Ours, however, is a case in which, "in the grips," citizenship rules according to numbers, and not according to States. It will be said that the rule of numbers will destroy the separate life of States; this is delicate ground. Are States to prevail in their numbers, irrespective of citizenship majorities? Are citizens to prevail in their numbers, irrespective of the future interests and existence of States? If either of these things were true, there could be no federation. The quarrel that our anti-Federalists raise is in the assertion that one, the latter of these propositions, is essential. It is cloaked by the assertion that it means majority rule; but the majority of the States and the majority of the people must both be reckoned with. If we fail as to one, we approach unification; if we fail as to the other, we draw nearer to a form of union which proclaims its weakness in every step. Surely, the true solution of a difficulty of this kind is one which enables the machine of government to continue its work, while it is made clear that the vital force of the equally represented States is not exercised in vain. While it is made certain that the will of the majority will prevail, it is also made certain that arguments must be heard. There is only one ultimate tribunal; to ignore that would have been to ignore the popular force which impelled the union of the colonies. But it is possible to recognize this in all its strength, and still to ensure that the minority is to have the fullest opportunity to offer to a reasoning community the supreme influence of argument on behalf of State interests.

As I have mentioned, the operation of responsible government is secured by making the House of Representatives the real custodian of the purse. There is further security in a provision which will be of interest to Americans. After the first general election, no Minister of State is to hold office for a longer period than three months, unless he has become a member of one or other of the houses. In the insistence on the principle of continuous responsibility lies the main difference between the Australian Constitution and that of the United States.

The power of the national or collective voice will be greater in Australia than it is in America. The power of the individual States will be greater than it is in Canada. But these two powers will not be allowed to continue in a condition of deadlock. If the two houses differ twice upon the same bill, then, if it has originated in the House of Representatives, the two houses may be dissolved simultaneously. If afterwards the difference continues, the Governor-General, with the advice of his ministers, may order a joint sitting, in which all the members, whether of the Senate or the House of Representatives, may deliberate together, and must vote together on the bill as last proposed by the House of Representatives, and on amendments made therein by one House, and not agreed to by the other. Any amendments affirmed by an absolute majority of the combined strength of the houses are to be taken as having been carried; and if the bill, together with any amendments so carried, is affirmed by an absolute majority, it is to be taken as passed by both houses, and it is to be presented to the Governor-General for assent. How effective this provision will be as to money bills, which have been the usual subjects of deadlocks under the several local constitutions, will appear from two facts; first, that it can only be called into action when the bill on which the difference arises has originated in the House of Representatives; secondly, that, as money bills must not be amended in the Senate, a final determination must be upon the precise form in which the House of Representatives chooses to leave the bill. Inasmuch as the House of Representatives is to contain as nearly as possible two members for every one in the Senate, there is little doubt that the cases will be few indeed in which the will of that house will not prevail at a joint sitting. Personally, I doubt if we shall ever reach a joint sitting, because the power to dissolve both houses simultaneously is, in itself, so drastic that, in all probability, its exercise will be avoided by reasonable concession.

But the people have yet further security for the absolutism of their self-government. Instead of being elected by the several Legislatures, as in the United States, senators are to be directly chosen by the people. They will each represent the whole of the State which elects them; while, in the House of Representatives, the members will be representatives of districts. The voters for each house will be the same persons, the difference being that, in voting for senators, each State is to be one entire electorate, and

will have equal representation without respect of number; while, in voting for the House of Representatives, each State will be represented in electoral divisions, purely according to the numbers of inhabitants. There is one broad fact which secures that each house will be popularly representative. This is that the franchise will be the same for the electors to each chamber.

Until a franchise, to operate uniformly throughout the Commonwealth, is made by the Federal Parliament, the suffrage will be in each State that which exists in elections to its lower chamber, which, in most of these colonies, is called the Legislative Assembly. The Federal Parliament, however, has no power to make a restrictive suffrage for Federal elections. It cannot by any law prevent any adult person, who has or acquires a right to vote at elections for the Legislative Assembly of a State, from voting at elections for either house of the Federal Parliament. Now, there is one colony, namely South Australia, which already gives the suffrage to women, as well as to men. It will follow that the federal franchise law must, in order to be uniform, extend the suffrage for the Australian Parliament to women in all the States. The conditions of membership of either of the Federal houses are:

1. The attainment of the age of twenty-one years;
2. The qualification of an elector for the House of Representatives;
3. A three years' residence within the limits of the Federal Commonwealth;
4. The being a British subject, either natural born or for five years naturalized.

It will be of interest next to state the principal powers of legislation which the Federal Parliament is to possess. There are thirty-nine of these, of which the principal are: Trade and commerce with other countries, and among the States; taxation, but so as not to discriminate between States, or parts of States; bounties on production or export, which must be uniform throughout the Commonwealth; borrowing on the credit of the Commonwealth; posts, telegraphs, telephones and the like; defence; lighthouses, light-ships, beacons and buoys; naturalization and aliens; immigration and emigration; influx of criminals; the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws; external affairs; the acquisition, with the consent of a State, of any railways of the

State on terms arranged; railway construction and extension in any State, with the consent of that State; conciliation and arbitration in industrial disputes extending beyond the limits of any one State; invalid and old-age pensions; marriage; divorce and matrimonial causes, and, in relation thereto, parental rights, and the custody and guardianship of infants.

Among the remaining powers may be mentioned quarantine, currency and coinage, banking, insurance, weights and measures, bills of exchange and promissory notes, bankruptcy, copyrights, patents and trade marks, and company laws.

The Parliament may declare by law the powers, privileges and immunities of each house, and of the members and committees; and, until so declared, they are to be as in the House of Commons in the United Kingdom.

I shall be thought to have enumerated legislative powers of pretty wide range. Will there be any restriction on their exercise, so long as the authority given is not exceeded? In my view little, if any. Under the instructions issued to the Governors of the various Australian Colonies in the past, there are few subjects on which a Colonial Governor is required to reserve bills for the Royal assent, instead of giving the assent himself; and, in case of such reservation, instances of withholding the Queen's assent have been rare. It is unlikely that the Governor-General of the Australian Commonwealth will be instructed to reserve any class of bills, unless, perhaps, such as may appear to be inconsistent with the treaty obligations of the British Crown, or bills of unusual importance affecting the royal prerogative, or the rights of property of British subjects not living within the Commonwealth, or prejudicing the commercial interests of other parts of the Empire; and experience renders it probable that, even in such cases, the self-governing powers of the Federal Parliament will be restricted as little as possible.

The Governor-General will be an imperial officer. He will reign without ruling; for he will be guided by the advice of his responsible ministers, except in the very limited instances in which his instructions may direct an independent course; and we may be sure that these instances will be as few as they are to-day in Canada.

The Australian Parliament, however, must act within the limits assigned by the Constitution. I mean that it will not be

able to decide for itself whether any law which it passes is constitutional or not. It is laid down that "every power of the Parliament of a Colony which has become or becomes a State shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."

State laws on subjects of concurrent jurisdiction will, of course, continue in force, except to the extent of the exercise by the Federal Commonwealth of its legislative powers, subject to the powers of alteration and repeal resident in the individual State; but when a State law is inconsistent with a Federal law the latter is to prevail, and the former is to be invalid to the extent of the inconsistency.

The Constitution is to be guarded by a Federal High Court, which is to consist of a Chief Justice, and not less than two other judges, and other courts may be invested with federal jurisdiction. Judges are to be appointed and removed by the Governor-General in Council, but must not be removed, except on an address from both houses of the Federal Parliament in the same session, and on the ground of proved misbehavior or incapacity.

The original jurisdiction of the High Court embraces matters arising under any treaty, or affecting representatives of other countries; or in which the Commonwealth, or a person suing or being sued on its behalf, is a party; or between States or residents of different States; or between a State and a resident of another State; or in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth: and original jurisdiction may be conferred on the High Court in any matter arising under the Constitution, or involving its interpretation, or arising under any laws made by the Federal Parliament, or in cases of admiralty or maritime jurisdiction, or cases relating to the same subject-matter claimed under the laws of different States. The High Court is also to have a wide appellate jurisdiction, whether as to the subjects of its own original jurisdiction, or as to appeals from any other federal court, or from any State court from which an appeal at present lies to the Privy Council. The High Court will also decide appeals, from the Interstate Commission, but on questions of law only. There is a saving of the

Queen's prerogative to grant special leave of appeal from the High Court to the Privy Council, subject to any future Federal laws limiting the matters in which such leave may be asked; and the general appeal to the Privy Council is expressly restricted, so as to exclude matters involving the interpretation of the Federal Constitution or of the constitution of a State, unless the matter involves public interests of some part of the Empire, other than the Commonwealth or any of the States.

It is clearly intended that the Federal High Court shall be a tribunal charged with most important duties, in the maintenance of the balance of the Constitution. It is well that its independence is sufficiently secured; for, in time, occasions will of necessity arise in which it must decide conflicts between laws of the Commonwealth and laws of the several States; for all Americans know that, in a constitution delegating to the National Parliament, not only certain exclusive powers, but many others which are for distinction called concurrent, the latter class of powers, touching as they do a number of questions upon which individual States have already legislated, and that with much variety, cannot possibly be exercised without occasional controversies as to the extent to which local laws are displaced by Federal laws. There are strong hopes that the Commonwealth will find within it judicial capacity equal to the occasion. It can be said with confidence that the judicial career and conduct in these colonies up to now have been such as to give good grounds for this expectation, and for the bold assertion, conveyed by the provision I have quoted, that the people who have made this Constitution are fit to be, through their judges, the final expositors of its meaning.

Adhering to the order observed in the instrument itself, it may here be said that the manner in which the Constitution deals with questions of finance and trade has been a subject of bitter controversy. In each of these colonies, the principal sources of revenue are the customs and excise, and it was clearly necessary to hand over to the central body, with the control of inter-state free-trade, the receipt of this revenue and the making of future tariffs. With six different tariffs operating not only upon external but also upon internal trade, there has, of course, grown up an apparent difference in the rates of consumption per head. It is an actual difference in the rates of consumption of dutiable articles. But here the difficulty arises, well known to American readers, of de-

termining the total rate of consumption when plain *data* exist for ascertaining the rate as to articles imported, while there are few or no *data* as to articles internally produced. It will be seen that this difficulty led to many of the misapprehensions of the opponents of the bill as to its financial provisions. The chief of these provisions are as follows: As soon as the Constitution takes effect, the collection and control of all customs and excise duties will pass to the Federal Government, but the proceeds of these duties will be far more than sufficient for any probable purposes of the Commonwealth. A Federal tariff must be passed within two years from the establishment of the Constitution, and, on its passage, trade and intercourse among the States, whether by land, river or sea, are to be forever free. Until the first Federal tariff is passed, the Commonwealth is to credit to each State the revenues collected therein by the Commonwealth. It is to debit to each State, first, whatever the Commonwealth spends in that State for keeping up, as at the time of transfer, any department transferred from the State to the Commonwealth; and, secondly, it is to debit to each State its proportion *per capita* of all other expenditure of the Commonwealth. The resultant balance is to be paid each month to the State. But this system will also go on, with a slight change, during the five years following the passage of the first tariff. As the enactment of the tariff brings with it inter-state free-trade, it is provided that, during the five years following the enactment, customs duties chargeable on goods imported into a State, and afterwards passing into another State for consumption, shall be taken to have been collected not in the former, but in the latter, State; and the same consideration is to apply to excise duties paid on goods produced or manufactured in a State, and afterwards passing into another State for consumption. With this deviation, the crediting of revenue, the debiting of expenditure, and the payment of balances to each State will proceed, for the five-year period, just as they are to be carried on for the period preceding the making of the first tariff. When the five years shall have elapsed, the Parliament will have collected the necessary *data* as to the operation of inter-state free-trade, and the consequent changes in the commercial and financial conditions of the several States; and it will then be more clearly apparent in what degree the consumption, per head, of dutiable articles has approximated in different parts of the Commonwealth. The Commonwealth is

then charged to provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenues of the Commonwealth.

But is the expenditure of the Commonwealth to be unrestricted? No. A clause which is to operate for ten years after the establishment of the Commonwealth, and afterwards until the Parliament makes other provision, deals with the net revenue of the Commonwealth from customs and excise, and provides that, out of this, the Commonwealth may not spend more than one-fourth, and must return the balance to the several States, subject, of course, to the financial provisions I have outlined. If, however, a certain other provision is acted upon, a deduction may be made from the balance payable to any State. This will occur if the Commonwealth takes over any part of the public debts of the States. If it does, the interest paid by the Commonwealth on such proportion of debt will be deducted from the balance payable to that State. It is wisely provided that the Commonwealth may take over from the States either the whole of their public debts, as existing at the establishment of the Constitution, or a *per capita* proportion. Such debts, or any part of them, may be converted, renewed or consolidated. It is the general hope that this enactment may be turned to account at a very early stage in the life of the Commonwealth, with the result that the superior credit of the Commonwealth will much reduce the interest as the process of renewal and conversion goes on.

The requirement that the Commonwealth must not retain for its own expenditure more than one-fourth of the net customs and excise revenue has been the butt of bitter attack. Passed at the instance of Sir Edward Braddon, the Premier of Tasmania, it has been vituperated in New South Wales under the name of "Braddon Blot." Its object was to afford some security against extravagance on the part of the Commonwealth, and consequently some guarantee of a return to the States substantial enough to prevent any severe dislocation of their finances; but because the restriction of the Commonwealth to the expenditure of one-fourth makes it necessary that the remaining three-fourths should be distributed among the States, it has been asserted that the Commonwealth will be obliged to raise an enormous customs revenue, amounting in every case to four dollars as against every dollar which it may require. The fact that the Commonwealth is not bound to raise

all of its revenue from customs and excise has been studiously ignored; and altogether, no clause has been more deftly used by the opponents of federation to terrify its friends than has this one. American readers will require no argument as to the position which has been taken up, because they know, as many Australians have not yet realized, that it is the same people who make local and Federal legislators and tariffs; and it is only those who have not yet entered into a federation who can possibly entertain the apprehension that the effect of their united efforts of self-government will be tantamount to their domination by a foreign power.

The seat of government of the Commonwealth is to be determined by the Parliament. It must be within territory granted to or acquired by the Commonwealth, in which it is to be vested. In short, it will be Federal territory, and the Federal Parliament will have the exclusive power to make laws for its government, and to determine the extent of its representation in either house of that Parliament. It is to be within the State of New South Wales; and, in return for that concession, it is to be distant not less than one hundred miles from Sydney, the State capital. The area is not to be less than one hundred square miles. Any Crown lands which it may contain—probably a considerable area—are to be granted by the State to the Commonwealth without payment. The Parliament is to sit at Melbourne, until it meets at the seat of government. It will be seen that the law as to the seat of government will follow that of the United States rather than that of Canada, inasmuch as the area containing the capital will be exclusively under the federation and not under the jurisdiction of any State. There can be very little doubt that the representatives of New South Wales in the federation will lose little time in urging the early choice of this territory. As the Legislatures of the several States sit generally in the winter, and as a member of a State Legislature is not excluded from sitting in the Federal Parliament, if elected, it is probable that convenience will be on the side of summer sessions. In that prospect, it is likely that the area chosen will be at a sufficient altitude to give the advantage of a good summer climate; and, happily, several such areas are open for choice in New South Wales.

The Constitution can be altered much more easily than that of the United States. A bill for the purpose must first, in

ordinary cases, be passed by an absolute majority in each house. It is afterwards to be submitted in each State to the electors qualified to vote for the election of members in the House of Representatives. This is to be done not less than two nor more than six months after the passage of the bill through both houses. If, however, an amendment passed by an absolute majority of one house fails to pass the other, or is passed with an amendment as to which the two houses differ, and if after an interval of three months, a similar difference occurs, the amendment may be submitted to the popular vote, just as if it had secured an absolute majority in both houses. In order to become law, the amendment must, at the referendum, secure a majority of the electors who vote, and it must also secure majorities in a majority of the States. The difficulty which will exist because in South Australia women as well as men have a vote is met by prescribing that, until there is a uniform suffrage throughout the Commonwealth, only half the electors voting for and against the amendment may be counted in any State in which adult suffrage prevails. If an amendment would lessen the proportionate representation of any State in either house, or would alter the limits of a State directly or indirectly, it is not to become law until it receives the approval of a majority of the electors voting in the State affected.

I have endeavored, in giving a summary of the provisions of this Constitution, to discharge the duty in such a way as to enable American readers to see clearly the points in which it differs from the Constitution of the United States and from that of Canada.

In this interesting labor it may be thought that I have left out some matters which would have been useful to observers across the ocean, but I believe that I have given the real substance and meaning of the instrument. The struggle for federation has lasted between eight and nine years, if we leave out of account the good work of many who advocated it before it became a tangible public question. In the actual labor of the struggle it has been my duty to take as active a part as any man, but it is unquestionable that it was the mind and the hand of the late Sir Henry Parkes which first gave practical direction to popular feeling and reason on the question of questions, and all Australians will hold his memory dear for the gift he strove so hard to win for them. Full of years, he passed away in 1896. He did not live to share or see

the labors of the elected convention of fifty men, who, representing five colonies, framed the Constitution in 1897 and 1898. Would that we had had his help in the battles which have ensued.

I believe this Constitution will be found a well-considered instrument of government, adapting the best conclusions of liberal statesmanship to the difficult problems presented by the necessity of preserving the force of federalism in the government of an aggregation of democratic States. As was the case with the Constitution of the United States, its enemies will attack it for many a day; but I have no fear either as to its strength against attack or as to its fitness for its appointed work in the hands of a free people, of keen insight and active reason.

EDMUND BARTON.